IN THE

Supreme Court of the United States

OCTOBER TERM 1979

MISC. NO. 79-282

IN RE

SUBPOENAS DUCES TECUM
ISSUED TO CUSTODIAN OF RECORDS
ALADDIN HOTEL CORPORATION,
Appellant-Petitioner,

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit

LONDON, GREENBERG & FLEMING
NORMAN S. LONDON
1600 Boatmen's Tower
100 North Broadway
St. Louis, Missouri 63102
(314) 231-8700
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

TABLE OF CONTENTS

Cases Cited

Statutes and Rules Cited

IN THE

Supreme Court of the United States

OCTOBER TERM 1979

MISC. NO. .....

IN RE
SUBPOENAS DUCES TECUM
ISSUED TO CUSTODIAN OF RECORDS
ALADDIN HOTEL CORPORATION,
Appellant-Petitioner,

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioner, Aladdin Hotel Corporation, a Nevada Corporation, prays that a Writ of Cetriorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on August 1, 1979 whereby the Court dismissed an appeal filed by the Aladdin Hotel Corporation from the order of the United States District Court for the Eastern District of Missouri denying a motion to quash a Grand Jury Subpoena issued to the Custodian of Records of said Corporation.

DECISION BELOW

The decision of the Court of Appeals is unpublished but the Order to Show Cause and the Order Dismissing the Appeal are appended hereto as Exhibits A and B.

JURISDICTION

The judgment of the Court of Appeals was entered on August 1, 1979. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where a corporation, which is not the target of a Grand Jury investigation, challenges a Grand Jury Subpoena Duces Tecum on grounds that the subpoena is unduly burdensome and oppressive and constitutes a general search warrant, must the corporation subject itself to a contempt citation in order to obtain appellate review of an adverse District Court decision?

STATUTE INVOLVED

Title 28, United States Code §1291 provides in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

STATEMENT

This is a petition for review of the decision of the Court of Appeals dismissing the appeal of the Aladdin Hotel Corporation (hereinafter Aladdin) which had filed its timely Notice of Appeal from the decision of the District Court denying its motion to quash two grand jury subpoenas duces tecum. The subpoenas were issued to the Custodian of Records of the Aladdin and called for the production, inter alia, of records of payments and loan transactions between or on behalf of the Aladdin, its officers, directors and employees and/or subsidiaries and one Peter J. Webbe for the years 1973 through the present, and additionally called for:

> "3. Records reflecting the identities of individuals who received various complimentary and/or courtesy services extended by the Aladdin Hotel Corp., including, but not limited to such items as free meals, air fare and lodging, such records to reflect the identities of Aladdin Hotel Corp. employees, officers or directors responsible for authorizing such services for the years 1973 through the present.
>
> "4. Records reflecting bad debt, or account write-offs, relating to gambling 'IOU's', otherwise known as 'Markers', including all supporting documentation, for the years 1973 through the present."

The subpoenas define the term "Records" as including but not limited to:

> ". . . Ledger books, papers, books, correspondence, memoranda, cancelled checks, check stubs, bank account statements, W-2 forms, 1099 forms, notes, balance books, etc."

The Aladdin supported its motion by the affidavits of its director of finance indicating that compliance with the subpoena

relating to documents pertaining to Peter J. Webbe would involve a week's work for approximately four individuals for each of the three specific categories of items requested, and that compliance with the subpoena relating generally to complimentary services and bad debts would involve over six million items and would require two additional full time individuals working in excess of one year to locate, photostat and collate the items for presentation.

Additionally, it was shown at the hearing on the motion to suppress that three FBI agents initially attempted to obtain access to the subpoenaed records on the premises of the Aladdin, in Las Vegas, through a previously issued subpoena which was later withdrawn.

The Government took the position in both its response to the Motion to Quash and at the hearing that the Aladdin was not directly a target of Grand Jury investigation, but that the Grand Jury was investigating the affairs of Peter J. Webbe to determine if Mr. Webbe was using the facilities of the Aladdin to transmit illegal payments to St. Louis governmental or political figures. According to the Government, therefore, the investigation is focusing on a number of persons or entities other than the Aladdin.

The Aladdin asserted in its motion that the subpoenas were unduly burdensom and oppressive and that they constituted general search warrants and that to require the Aladdin to comply therewith would violate its rights to due process and equal protection of the law.

After a hearing on the motion, at which both the Government and the Aladdin presented evidence, the District Court issued its order denying the motion to quash with regard to the documents pertaining specifically to Peter J. Webbe, and modifying the subpoena pertaining to the other documents so as to require the Aladdin to produce:

1. Corporate minute books for the years 1973 through the present;

2. Corporate stock transfer register for the years 1973 through the present;

3. Check registers, subledger cards, and summary sheets and lists reflecting the identities of individuals who received various complimentary and/or courtesy services extended by the Aladdin Hotel Corporation for the years 1973 through the present;

4. Monthly reports showing lists of markers and return checks written off as uncollectible or as bad which reflect bad debts and/or account write-offs relating to gambling IOU's for the years 1973 through the present.

The District Court then ordered the subpoenas enforced as modified, whereupon the Aladdin filed its Notice of Appeal.

The Government filed a motion to dismiss the appeal contending that under this Court's opinion in *United States v. Ryan*, 402 U.S. 530 (1971) orders denying motions to quash subpoenas are not final orders appealable under 28 U.S.C. § 1291 and that, therefore, the Court of Appeals did not have jurisdiction to entertain the appeal.

The Court of Appeals issued its order to show cause why the appeal should not be dismissed (Exhibit A) to which the Aladdin filed its timely response asserting that, since it was not a target of the investigation, the Aladdin should not be required to subject itself to the penalties of contempt in order to assert its appellate rights and that denial of immediate review would render impossible any review whatsoever.

The Court of Appeals, nevertheless, dismissed the appeal and ordered its mandate forthwith from which dismissal this petition

is taken requesting this Court to review the circumstances and law under which an appeal was denied to the Aladdin.

Prior to filing this petition, however, the Aladdin has produced for the Grand Jury, the records called for in the first of the two subpoenas, to wit the record relating to documents pertaining to Peter J. Webbe and has also complied with the first two paragraphs of the District Court's order modifying the second subpoena. Consequently, the remaining issues, unresolved by the Court of Appeals, pertain to the oppressive and burdensome nature of paragraphs 3 and 4 of the modified subpoena. Assembly and production of those documents, would according to the Aladdin's director of finance, take considerable time and effort because much of the information is on microfilm and many of the check registers have been destroyed or misplaced as a result of previous State and Federal Tax Audits. Accordingly, it is the Aladdin's position that the modification of the subpoena with respect to the general demand for records of complimentary services and bad debt write offs did not adequately reduce its burdensomeness. The Aladdin has, therefore, not complied with paragraphs 3 and 4 and the Government has indicated that it will initiate contempt proceedings.

REASON FOR GRANTING THE WRIT

Decisions of the Eighth Circuit Court of Appeals as Well as Other Federal Courts Indicate That Much Confusion Yet Exists as to the Circumstances Under Which an Order Denying a Motion to Quash a Grand Jury Subpoena Will Be Considered a Final Order, Appealable Under 28 U.S.C. § 1291 and Under What Circumstances a Witness Must Be Subjected to Contempt Proceedings in Order to Assert Appellate Rights.

In *United States v. Ryan*, 402 U.S. 530 (1971), this Court reiterated the general rule set forth in such prior cases as *Cobbledick v. United States*, 201 U.S. 117 (1940), and *Alexander v. United States*, 201 U.S. 117 (1906), that an order denying a motion to quash a grand jury subpoena is not appealable under 28 U.S.C. §1291. However, the Court noted an important caveat to this general rule in the "limited class of cases where denial of immediate review would render impossible any review whatsoever of an individual's claims." (402 U.S. 533).

This exception merely reiterated the rule set forth long ago in *Perlman v. United States*, 247 U.S. 7 (1917), that such orders are appealable where the movant is "powerless to avert the mischief of the order." The *Perlman* exception was recognized and applied in the Eighth Circuit as well as other circuits prior to this Court's decision in *Ryan, supra.* See, e.g.: *Schwimmer v. United States*, 232 F. 2d 855 (8th Cir. 1956), and *Continental Oil Company v. United States*, 330 F. 2d 347 (9th Circuit 1964).

Subsequent to *Ryan*, several courts, including the Eighth Circuit in *In Re Grand Jury Subpoena for Appearance of Patrick Felatico*, 561 F. 2d 110 (8th Cir. 1977), have continued to recognize cases as falling under the exception where the subpoena has been directed to a third party (not a target) "who

could not be expected to expose himself to the penalty of contempt in order to obtain appellate review." (561 F. 2d 111). In *United States v. Roe*, 455 F. 2d 753 (1st Cir. 1972), the Court of Appeals for the First Circuit recognized a right of appeal by Senator Gravel from an order denying a motion to quash a grand jury subpoena issued to one of his legislative assistants who was not a subject of the investigation. Citing *Perlman v. United States, supra,* the Court of Appeals reasoned that "the subpoena was not addressed to intervenor (Gravel) but to third parties, who could not be counted on to risk contempt in order to protect intervenor's constitutional rights . . . Hence he was 'powerless to avert the mischief of the order' unless permitted to appeal it." (455 F. 2d 757).

Prior to the *Ryan* decision, this Court had expressed the exception in somewhat more broad terms. In *DiBella v. United States,* 369 U.S. 121, 124 (1961), the exception was said to apply "where the damage of error unreviewed before the judgment is definite and complete and has been deemed greater than the disruption caused by intermediate appeal" and also "where the practical effect of the order will be irreparable by any subsequent appeal." Neither *Perlman* nor *DiBella* were overruled in *Ryan,* but the extent to which the exception is to be applied remains unclear and would appear to require a balancing of the harm caused by immediate enforcement against the "disruption caused by intermediate appeal."

In this connection it should be noted that in *Continental Oil* case, *supra,* the Court of Appeals proceeded to hear the appeal on an expedited basis and to render an immediate ruling and preliminary order followed later by a more extensive opinion. Consequently, there was little, if any, description of the Grand Jury proceedings as a result of the appellate process, as opposed to contempt proceedings.

It is respectfully submitted that the assumption that an appeal from the denial of a motion to quash will somehow be

more disruptive of the Grand Jury proceedings than an appeal from a contempt citation is somewhat unfounded. The issues raised in the motion to quash are immediately before the Court of Appeals without the need for the witness to disobey the Grand Jury's order. In the instant case, the transcript of the hearing had been prepared and was ready for filing. An expedited appeal procedure would have determined the issues raised within such time as the Court of Appeals may have directed.

On the other hand, contempt proceedings require not only a direct confrontation with the legal process but also the following steps:

1) The appearance of the witness before the Grand Jury and refusal to comply with the subpoena;

2) Initiation of contempt proceedings by the United States Attorney;

3) Notice to the witness of the contempt proceedings. Note that in *United States v. Alter,* 482 F. 2d 1016 (9th Cir. 1973), the Ninth Circuit concluded that the five day notice requirements of Rule 6(d) F.R.C.P. should be followed in grand jury proceedings unless good reasons are shown for shortening or lengthening the time. Other cases have held that notice should provide at least a "reasonable time" for preparation of the defense. See, *In Re Virgil,* 524 F. 2d 209 (10th Cir. 1975); *United States v. Boe,* 491 F. 2d 970 (8th Cir. 1974); Cf: *Groppi v. Leslie,* 404 U.S. 496 (1972) (involving inadequate notice of contempt proceedings by state legislature);

4) A full "Uninhibited Adversary Hearing" on the contempt with the right to call witnesses. See: *United States v. Dinsio,* 468 F. 2d 1392 (9th Cir. 1973) and *United States v. Alter,* 482 F. 2d 1016 (9th Cir. 1973);

5) Proceedings relative to the bond or stay of execution if incarceration is ordered. Note that 28 U.S.C. §1826(2)(b)

provides for denial of bond if the appeal is "frivolous or taken for delay", but assumes the availability of bond in other cases. *United States v. Handler*, 476 F. 2d 709 (2nd Cir. 1973); *Melikian v. United States*, 547 F. 2d 416 (8th Cir. 1977);

6) The filing of a notice of appeal and determination through the appellate process.

Five of the foregoing six steps could be avoided if the Court of Appeals would assume jurisdiction of the denial of the motion to quash. Moreover, it would not be necessary for a third party (which is not a target), such as the Aladdin, to subject itself to the adverse consequences of a contempt citation in order to assert its constitutional rights. Although this is obviously critical in the case of an individual it is equally important where a corporation, such as a casino, must avoid even the appearance of impropriety in order to maintain licenses or franchises. It is for this reason that the Aladdin has sought to comply to the extent reasonably possible with the subpoenas. As indicated, the Aladdin has produced the documents called for with the exception of those generally described in paragraphs 3 and 4 of the modified subpoena which the Aladdin asserts are unduly burdensome. The Aladdin, therefore, has not and does not seek appellate rights in order to delay or disrupt the Grand Jury proceedings, but on the contrary, seeks to resolve the issues raised with as little disruption as possible and without the necessity of disobeying the District Court's order and subjecting itself to contempt proceedings.

It is submitted, therefore, that to require a corporation such as the Aladdin under the circumstances of this case, to subject itself to a contempt citation in order to assert appellate rights effectively undermines those rights without any compelling necessity.

Guidance is needed, therefore, to clarify the rule and the exceptions noted in *Ryan* and to determine under what circumstances the contempt process can be avoided through an appeal of a motion to quash.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment of the Court of Appeals in dismissing the Aladdin's appeal.

Respectfully submitted,

LONDON, GREENBERG
& FLEMING

NORMAN S. LONDON
1600 Boatmen's Tower
100 North Broadwday
St. Louis, Missouri 63102
(314) 231-8700
Attorneys for Petitioner

APPENDIX.

EXHIBIT A

United States Court of Appeals for the Eighth Circuit

No. 79-1574

In Re Subpoenas Duces Tecum Issued to Custodian of Records Aladdin Hotel Corporation, Appellant.	Appeal from the United States District Court for the Eastern District of Missouri.

Filed: July 25. 1979

Before HEANEY, ROSS and McMILLIAN,Circuit Judges.

ORDER

By order of the Honorable H. Kenneth Wangelin, District Judge of the Eastern District of Missouri, movant's motion to quash two subpoenas duces tecum was denied and movant was ordered to comply with the terms of the subpoenas, as modified by the order, by producing certain records to the special grand jury at its next regular session on August 2, 1979. On July 18, 1979, movant filed a notice of appeal and the district court granted a stay pending appeal.

The government now moves to dismiss for lack of jurisdiction and requests an expedited decision. Since it appears that this court lacks jurisdiction to entertain this appeal [*United States v. Ryan*, 402 U.S. 530 (1971)], and an expedited appeal is authorized by Rule 2, Fed. R. App. P., movant-appellant is directed to show cause within five days, by July 30, 1979, why the appeal should not be dismissed. No extensions will be granted.

It is so ordered.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

[Not to be published.]

EXHIBIT B

United States Court of Appeals for the Eighth Circuit

No. 79-1574 September Term, 1978

In Re Subpoenas Duces Tecum Issued to Custodian of Records Aladdin Hotel Corporation, Appellant.	Appeal from the United States District Court for the Eastern District of Missouri.

Before HEANEY, ROSS and McMILLIAN,Circuit Judges.

Response of appellant, Aladdin Hotel Corporation, to this Court's show cause order as to why the above appeal should not be dismissed for lack of jurisdiction having been filed and considered by the Court, it is now here ordered that this appeal be, and it is hereby, dismissed.

Mandate forthwith.

August 1, 1979

No. 79-282

In the Supreme Court of the United States

OCTOBER TERM, 1979

IN THE MATTER OF ALADDIN HOTEL CORPORATION,
PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-282

IN THE MATTER OF ALADDIN HOTEL CORPORATION,
PETITIONER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends (Pet. 7-11) that an order of the district court denying petitioner's motion to quash two grand jury subpoenas *duces tecum* is a final decision appealable under 28 U.S.C. 1291.

1. In May 1979, a grand jury sitting in the United States District Court for the Eastern District of Missouri subpoenaed various records of petitioner in connection with an investigation of official corruption in St. Louis, Missouri. Contending that compliance would be overly burdensome, petitioner moved to quash the subpoenas. The district court modified one of the two subpoenas duces tecum in question and ordered petitioner to comply with the subpoenas as modified (Pet. 3-5; Pet. App. A-1).

On appeal, the government moved to dismiss the appeal for lack of jurisdiction. Relying on *United States* v. *Ryan*, 402 U.S. 530 (1971), the court of appeals summarily granted the government's motion and dismissed the appeal (Pet. App. A-1, A-2).

2. 28 U.S.C. 1291 reflects a strong congressional policy against piecemeal review, particularly in the context of criminal proceedings. See, *e.g.*, *United States* v. *MacDonald*, 435 U.S. 850, 853-857 (1978); *United States* v. *Nixon*, 418 U.S. 683, 690 (1974); *DiBella* v. *United States*, 369 U.S. 121, 126 (1962). Accordingly, this Court has repeatedly concluded that the denial of a motion to quash a subpoena is not ordinarily an appealable order. *E.g.*, *United States* v. *Nixon*, *supra*, 418 U.S. at 690-691; *United States* v. *Ryan*, 402 U.S. 530 (1971); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *Alexander* v. *United States*, 201 U.S. 117 (1906). Consequently, a person who seeks to resist the production of evidence and wishes to establish his right to appellate review of an order compelling production of documents must generally refuse to comply with that order and suffer the consequences of his contempt. See *United States* v. *Ryan*, *supra*, 402 U.S. at 532-533; *Cobbledick* v. *United States*, *supra*, 309 U.S. at 328. This case presents no exceptional circumstances warranting departure from this well settled rule.

Petitioner suggests (Pet. 7-8) that, because it is not the subject of the grand jury investigation, the Court's decision in *Perlman* v. *United States*, 247 U.S. 7 (1918), somehow controls this case. But *Perlman* involved the appeal of a third party intervenor who was not the party to whom the subpoena was addressed. Since such a person cannot depend on the subpoenaed party's willingness to suffer the consequences of a contempt citation in order to vindicate his rights, this Court permitted the appeal, noting that otherwise Perlman would be "powerless to avert the mischief of the order." *Id.* at 13. See also *In re Faltico*, 561 F. 2d 109, 110 n.2 (8th Cir. 1977); *United States* v. *Doe*, 455 F. 2d 753, 756-757 (1st Cir.), vacated on other grounds, *Gravel* v. *United States*, 408 U.S. 606, 608-609 n.1 (1972). Here, however, petitioner is the party named in the subpoena, and therefore it is not "powerless to avert the mischief of the order." There is, in sum, nothing to distinguish this case from the consistent line of authority barring appeal from an order enforcing a subpoena.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1979

DOJ-1979-10